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Office of Court Administration
25 Beaver Street
New York, New York 10004

Re: Proposed Part 523 of the Rules of the Court of Appeals and Proposed Amendments to Part 522 of the Rules of the Court of Appeals

Dear John:

I am pleased to enclose a report prepared by our Committee on Standards of Attorney Conduct and approved by our House of Delegates on November 7, 2015 with respect to (1) the proposed rules governing temporary practice in New York by lawyers admitted in other jurisdictions and (2) the proposed amendments of the rules governing licensing of in-house counsel to permit foreign lawyers to be licensed.

With respect to temporary practice, as you know in 2012 our Association submitted a report to you recommending the adoption of rules governing temporary practice in New York. We are gratified that these rules are being considered by the Court and support their adoption. In addition, our report responds to the questions posted in the Request for Comment issued by the Court.

With respect to in-house counsel, we note that in 2010 our Association submitted a proposal for licensing of in-house counsel, and that proposal included licensing of foreign lawyers. I am pleased to advise that our Association supports the current licensing proposal.

We commend the report to you for the Court's consideration and would be pleased to provide any additional information you may require or be of other assistance.

Respectfully submitted,

David P. Miranda

NEW YORK STATE BAR ASSOCIATION

NEW YORK STATE BAR ASSOCIATION COMMENTS ON PROPOSED CHANGES TO THE RULES OF THE COURT OF APPEALS THAT WOULD (1) PERMIT TEMPORARY PRACTICE BY OUT-OF-STATE AND FOREIGN LAWYERS AND (2) ALLOW FOREIGN LAWYERS TO REGISTER UNDER THE IN-HOUSE COUNSEL RULE

November 9, 2015

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Executive Summary

This report recommends that:

- The proposed Temporary Practice Rule should be modified by replacing "admitted and authorized to practice law in another jurisdiction" with the definition of foreign lawyer that is currently in New York's Rule on Licensing Legal Consultants and is proposed for the In-House Counsel Registration Rule. This change would avoid potential ambiguity and align the Temporary Practice Rule with ABA Model Rules, such rules elsewhere, and the other New York rules addressing foreign lawyers which, among other things, require that the foreign lawyer be subject in their home countries to some kind of formal admission system and "effective regulation."
- The following phrase should be added to the opening paragraph of the proposed Temporary Practice Rule: "or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction" (see *infra* at pp. 10-11).
- The Temporary Practice Rule should not define "temporary practice."
- The Temporary Practice Rule should not include a registration requirement.
- No additional disciplinary procedures or bodies are necessary for the enforcement of the Temporary Practice Rule.
- The Temporary Practice Rule should not apply to candidates applying for admission to the New York bar. Lawyers permitted to practice pending admission would be seeking to establish a continuous and permanent presence in New York. By contrast, temporary lawyers do not seek to establish a permanent and continuous presence. While policy considerations may overlap, there are sufficient differences between bar applicants and temporary lawyers to warrant separate rules. The NYSBA's 2012 recommendation for a rule permitting practice pending admission would recognize these differences. The NYSBA would be pleased to submit a supplemental report in light of developments since 2012.

- The Temporary Practice Rule should not apply to registered in-house counsel from other states or to licensed foreign legal consultants because these lawyers can practice temporarily in New York based on their home-state or home-country status. If the Court adopts the In-House Counsel Amendments, it will not be necessary to specifically apply the Temporary Practice Rule to registered foreign in-house counsel either.
- The In-House Counsel Amendments published for comment on September 24, 2015 should be adopted. The Court should then consider ways to make this rule apply to in-house counsel from European and other jurisdictions who are not effectively regulated as "lawyers" in their home jurisdictions but who are otherwise sufficiently qualified to be registered in-house counsel in New York.

I. Introduction

The New York State Bar Association ("NYSBA") respectfully submits these comments in response to two proposals issued in September 2015 by the Office of Court Administration ("OCA"). One proposes a new Court of Appeals Rule, to be adopted as 22 NYCRR § 523, which would permit temporary practice by out-of-state and foreign lawyers (the "Temporary Practice Rule"). The second proposes amendments to the Court of Appeals Rule on Registration of In-House Counsel, set forth at 22 NYCRR § 522. The amendments (hereinafter referred to as the "In-House Counsel Amendments") would permit foreign lawyers to register.[1]

The NYSBA applauds these major steps forward for the courts and the legal profession in New York. The Temporary Practice Rule will enhance New York's role as a center of world commerce "by permitting lawyers from other jurisdictions to appear in this state to work on transactional or short-term litigation-related matters (so-called 'fly-

[1] On September 4, 2015, the Office of Court Administration ("OCA") issued a memo seeking comments on the proposed new 22 NYCRR § 523 (the "September 4th OCA Memo"). On September 21, 2015, OCA issued an amended version of proposed 22 NYCRR § 523 (the "September 21st OCA Memo), clarifying that "subsections (a) through (d) of section 523.2 set forth separate and disjunctive conditions under which temporary practice may occur." We believe the September 4th OCA Memo made clear that these subsections should be read in the disjunctive, as they are under ABA M.R. 5.5(c), but welcome the clarification. On September 24, 2015, OCA issued a memo seeking comment on proposed amendments to 22 NYCRR § 522, which would permit foreign lawyers to register under the in-house counsel rule (the "September 24th OCA Memo").

in, fly-out' events)."[2] The proposed In-House Counsel Amendments will open in-house practice to many foreign lawyers, as it has been open to out-of state lawyers since April 2011 to salutary effect.

New York has long been a worldwide hub of complex dispute resolution and sophisticated commercial transactions. With the development of globalization and technology, New York's prominence has only increased. It is thus right and fitting that New York be a leader in opening the doors of its legal profession to out-of-state and foreign lawyers, so long as the courts and the public are protected in the process. The September 2015 proposals accomplish both goals. We commend these initiatives, which make major contributions to the law governing lawyers in New York. In this report, we address OCA's request for comments.[3]

II. Discussion

Under the Temporary Practice Rule, a lawyer who is "*admitted and authorized to practice law* in another jurisdiction within or outside the United States who is not disbarred or suspended from practice in any jurisdiction. . . " may provide services in New York "if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is *admitted to practice* . . . ."[4] This standard works well for lawyers from other states. We have long supported extending a temporary practice privilege to our colleagues from around the United States. We believe the Temporary Practice Rule is clear and well-crafted to accomplish this goal.

The principal issue raised by both the Temporary Practice Rule and the In-House Counsel Amendments, however, is how New York should define "foreign lawyer." In general, we support rules that will open New York to a wide range of foreign practitioners, so long as the public and the courts are protected. Broad rules on foreign lawyers will bring even more international legal business to New York. They will create good-will across the legal profession worldwide. They will also open opportunities to New York lawyers as global trade increases because allowing more foreigners to work here will tend to encourage a general lessening of barriers elsewhere.

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[2] *See* September 4th OCA Memo at 1.

[3] *See,* September 4th OCA Memo at 1-2; September 24st OCA Memo at 1.

[4] *See* Proposed 22 NYCRR § 523.2 (Scope of Temporary Practice – General); § 523.2(c) & (d) (emphasis added).

The Temporary Practice Rule is "modeled principally on (1) a draft rule recommended by the NYSBA in 2012 . . . and (2) American Bar Association (ABA) Model Rule ('M.R.') 5.5 permitting the temporary practice of law by attorneys licensed in other U.S. jurisdictions under certain prescribed circumstances. . . . "[5] But the Temporary Practice Rule does not include the definition of foreign lawyer that is contained in ABA M.R. 5.5 or in other ABA Rules allowing practice by foreign lawyers. The ABA definition requires that a foreign lawyer "be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and *are subject to effective regulation and discipline by a duly constituted professional body or a public authority*."[6]

The In-House Amendments, by contrast, do adopt the ABA definition of "foreign lawyer."[7] Under the In-House Amendments a foreign lawyer must be "a member in good standing of a recognized legal profession in a foreign (non-U.S.) jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or a public authority."[8] New York's current rule on licensing foreign legal consultants also contains this definition.[9]

In general we support this approach. The Court could reasonably choose to define foreign lawyer differently in the Temporary Practice Rule because the Rule's purpose is

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[5] ABA M.R. 5.5(d) also permits lawyers "admitted . . . in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction . . . " to serve as in-house counsel.

[6] *See* ABA M.R. 5.5(d) (emphasis added). *See also* ABA Model Rules on Foreign Legal Consultants and Registration of In-House Counsel. The full text of the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants and a chart showing which states have adopted the rule are available at http://bit.ly/19KqAkA (last visited October 6, 2015). A redlined version of the Model Rule for Registration of In-House Counsel as amended as amended in 2013 is available at http://bit.ly/1rjlruV .(last visited October 6, 2015). A state-by-state chart describing in-house counsel regulations is at http://bit.ly/1tWIgTl (last visited October 6, 2015).

[7] September 24th OCA Memo, *passim*.

[8] In-House Counsel Amendments at § 522.1(b)(1)(a). The ABA Model Rule for Registration of In-House Counsel, as amended in 2013, contains the same definition. See http://bit.ly/1rjlruV (last visited October 6, 2015). The ABA uses the same definition of foreign lawyers for M.R. 5.5, the Model Rule for Temporary Practice by Foreign Lawyers, the Model Rule for In-House Registration and the Model Rule for the Licensing and Practice of Foreign Legal Consultants. Most jurisdictions adopting a rule permitting practice by foreign lawyers use the same or a similar definition. See discussion *infra* at pp 8-9.

[9] *See,* 22 NYCRR § 521.1(a)(1) (to qualify for licensed legal consultant status, a lawyer must be "a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority").

unique. The Temporary Practice Rule contemplates the brief, intermittent, and occasional provision of services in New York by a foreign lawyer. By contrast, the In-House Counsel Amendments permit a foreign lawyer to establish a permanent and continuous presence in New York. Still, we suggest some modifications, as detailed below.

III. Which Foreign Lawyers Should Be Covered By These Rules

A. Who Is a Foreign "Lawyer"?

Foreign lawyers practice under a variety of regimes. Some foreign jurisdictions permit legal practice without formal admission to the bar. For example, in Mexico, lawyers (*abogados*) obtain a practice certificate (*cedula*) from the Government to practice by completing a five-year law degree program and registering with the Ministry of Education (Art. 25 of the Ley General de Profesiones), but they are not members of any bar association (*colegios de profesionistas*).[10] The registration with the Ministry of Education and the *cedula* is a filing, rather than a formal admission process that might involve, *e.g.,* an examination of a candidate's background, character and fitness. In some countries practitioners who consider themselves lawyers are not subject to professional regulation at all. Rather, their conduct --- if improper --- would be controlled only through broadly focused civil and criminal laws that govern non-lawyers as well. Our review of available resources also suggests that --- while most foreign countries require some type of study in order to be authorized to practice law --- many foreign countries require undergraduate degrees only. Many countries also do not conduct any character and fitness investigations. By some counts, fewer than 1/3 of the countries worldwide that authorize the practice of law have any formal organization governing the legal profession.[11]

Finally, in some countries --- notably in France, other countries in the European Union, and elsewhere --- in-house counsel are not treated as lawyers at all. They are not

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[10] *See, El restablecimiento de la colegiación obligatoria de la abogacía en México: un paso necesario, available at* http://www.abogacia.es/2014/09/19/el-restablecimiento-de-la-colegiacion-obligatoria-de-la-abogacia-en-mexico-un-paso-necesario/ (last visited October 7, 2015) advocating the reintroduction of the compulsory bars and reestablishing the compulsory association of lawyers.

[11] This summary is based on conversations with European lawyers, people affiliated with the ABA, charts prepared in connection with ABA deliberations on related issues, and a review of the *Summary of State Foreign Lawyer Practice Rules* by Laurel Terry dated 4/28/15 http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_8_9_status_chart.authcheckdam.pdf (last visited October 6, 2015) and the links cited therein.

members of the bar. The attorney-client privilege does not attach to their communications with their corporate clients.[12] By contrast, other countries --- including some countries in Europe (*e.g.* Denmark, Ireland, Portugal, Spain the U.K. and Germany) ---- allow in-house counsel to be members of the bar.[13]

Against this potpourri of regulatory and licensing regimes (or lack of thereof) the challenge for New York is to adopt rules that will accommodate the needs of an increasingly global and cross-border profession, yet protect the public and the courts in New York. We believe the proposals largely do this --- but suggest some small modifications.

B. Recommended Modifications

1. Definition of Foreign Lawyer

As noted, the Temporary Practice Rule permits practice by any lawyer from outside the U.S. who is "admitted and authorized to practice law in another jurisdiction."[14] This phrase is ambiguous and hard to apply. As noted above, in some countries a person is never formally "admitted" but may be authorized to practice law without taking a bar exam or completing a legal education or submitting to a character investigation --- and may also not be subject to effective regulation. Most importantly, since we understand a key assumption underlying the Temporary Practice Rule to be that the home jurisdiction will be primarily responsible for regulating such lawyers, the lack of effective regulation elsewhere creates a risk to the public here.[15]

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[12] *See*, *Akzo Nobel Chemicals, Ltd. v. European Commission*, Case-550/07, [2010] http://curia.europa.eu/juris/document/document.jsf?text=&docid=82839&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=37940 (last visited October 6, 2015) (in-house counsel lack sufficient independence to be members of the bar; the attorney-client privilege does not attach to communications between in-house counsel and their corporate clients; at least 19 of the 28 members of the European Union (Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Romania, the Slovak Republic, Slovenia, and Sweden) prohibit in-house counsel from becoming members of the bar.). *See also, Règlement Intérieur National de la Profession d'Avocat – RIN* http://cnb.avocat.fr/Reglement-Interieur-National-de-la-profession-d-avocat-RIN_a281.html#1 (last visited October 7, 2015) (in-house counsel cannot be members of the bar).

[13] *See*, *Akzo Nobel* and the opinion of Advocate General Kokott in *Akzo Nobel*, http://www.acc.com/advocacy/upload/AG-Opinion-AKZO-042910.pdf (last visited October 7, 2015).

[14] Proposed 22 NYCRR § 523.2 opening paragraph. *See also*, § 523.2(c) (permitting certain services related to the lawyer's practice "in a jurisdiction in which the lawyer is *admitted*"); §523.2(d)(same).

[15] Even in Virginia --- the only jurisdiction of which we are aware that has adopted an "authorized to practice" standard --- the rule also provides that the lawyer must be authorized "by the *duly constituted and*

We recommend instead that the Temporary Practice Rule incorporate the definition of foreign lawyer that is already codified in New York's Rule on Licensing Legal Consultants[16] and is proposed in the In-House Counsel Amendments. These provisions require that a foreign lawyer be

> a member in good standing of a recognized legal profession in a foreign (non-U.S.) jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or a public authority. [17]

Jurisdictions that now allow temporary practice by foreign lawyers use a similar definition and require, at a minimum "admission" or a "license", which, as we understand those terms, both assume a regulatory regime.[18] The advantage of this definition is that

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authorized governmental body of any State or Territory of the United States or the District of Columbia, or a foreign nation." Va. R. Prof. Conduct 5.5(d)(1) (emphasis added).

[16] 22 NYCRR § 521.1(a)(1).

[17] Proposed § 522(1)(b)(1).

[18] At least eight of the ten jurisdictions that allow temporary practice by foreign lawyers have adopted the same or a similar definition. *See, e.g.* Colorado Rule 205.2 https://www.coloradosupremecourt.com/BLE/Forms/New%20Admission%20Rules%20(9-1-14).pdf (last visited October 2, 2015) (to practice as a temporary attorney in Colorado, a foreign lawyer must be, *inter alia,* "a member of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as attorneys or counselors of law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority"); http://courts.delaware.gov/rules/DLRPCFebruary2010.pdf (last visited October 2, 2015) (lawyer must be "admitted" in a foreign jurisdiction and "not suspended or disbarred", which suggests an effective regulatory regime); D.C. App.R. 49(b)(12)(i) and (13) http://www.dccourts.gov/internet/documents/rule49.pdf (last visited October 2, 2015) ("is authorized to practice law by the highest court of a state or territory or by a foreign country, and is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court."); Florida Rule of Prof. C. 4-45(d) https://www.floridabar.org/divexe/rrtfb.nsf/FV/AE4F324F9F246B2085257A2C00628278 (last visited October 2, 2015) (the foreign lawyer must be, *inter alia*, a "member in good standing of a recognized legal profession in a foreign jurisdiction whose members are admitted to practice as lawyers or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority"); Georgia Rule of Prof C. 5.5(e), (f) & (g) http://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=129 (last visited October 2, 2015) (the foreign lawyer must be, *inter alia*, "a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at a law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or public authority"); New Hampshire Supreme Court Rule 42C(b) http://www.courts.state.nh.us/rules/scr/scr-42c.htm (last visited October 2, 2015) (same); Oregon Rule Prof. C. 5.5(c), (d), and note following the rule https://www.osbar.org/_docs/rulesregs/orpc.pdf (last visited October 2, 2015) (the foreign lawyer must be "admitted in another jurisdiction, and not disbarred or suspended from practice in any jurisdiction"; this provision inserted to permit "foreign-licensed lawyers" to practice temporarily in Oregon); Pennsylvania Rule 5.5(c) http://www.pacode.com/secure/data/204/chapter81/s5.5.html (last visited October 2, 2015) ("[a]

it is clear, nearly uniform throughout the jurisdictions that have adopted a rule permitting temporary practice by foreign lawyers, and provided as a model by the ABA in its rules addressing practice by foreign lawyers in the U.S. Lawyers inside and outside the U.S. will be able to better gauge what is permitted if this definition is adopted.

This well-accepted definition will benefit both lawyers and the courts. Analysis and interpretation will be available more broadly, as the contours of the definition develop through judicial interpretation. Lawyers and the courts will also benefit from what is likely to be more authority, clearer guidelines, and harmonized interpretation.

The limitation of this definition is that it may exclude from temporary practice in New York foreign "lawyers" who may be qualified by education and experience to practice here but are not formally "admitted" and may not be subject to an effective regulatory regime in their home countries. So, using this definition may exclude lawyers from countries like Mexico where, we understand, there is no formal admission and no effective regulatory apparatus.

2. A New Provision To Accommodate Certain Foreign In-House Lawyers

We also recommend that the Temporary Practice Rule specifically include certain foreign in-house counsel --- from Europe and elsewhere --- who may not be considered "lawyers" in their home jurisdictions.[19] We see no reason why an in-house counsel from Montana would be allowed to continue to advise his or her employer on brief or sporadic visits to New York but an in-house counsel from France or Italy would not be able to do so, even though in-house counsel's services are limited to work for their entity employer. The employers have an on-going and close relationship with their in-house lawyers. These employers are well positioned to evaluate the competence and quality of these lawyers, who would not in any event be providing legal services to the general public. As a consequence, these in-house services would involve little risk to the public, and would be beneficial to the large foreign companies, businesses, and other entities that do

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lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide [certain temporary] legal services").

[19] See discussion *supra* at pp. 8 - 9.

business here and may from time-to-time need the temporary assistance in New York of their own in-house lawyers who are normally based in their home countries.[20]

We suggest inserting the phrase into the general paragraph under § 523.2: "or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction." The provision would then read as follows (with new language underscored):

> 22 NYCRR § 523.2 A lawyer . . . who is not disbarred or suspended from practice in any jurisdiction, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide on a temporary basis in this state legal services . . .

IV. Questions Posed in the September 4th OCA Memo

A. Question One: Should the Rule Contain a Definition of "Temporary Practice"?

The rule should not contain a definition of "temporary practice."

"Temporary practice" is difficult to define, and highly fact specific. Perhaps for that reason, the temporary practice rules in every jurisdiction of which we are aware --- more than 40 --- do not define the term. Nor does ABA Model Rule 5.5. As stated in Comment [6] to M.R. 5.5:

> There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

Leaving the term undefined allows for individual analysis based on the wide variety of circumstances in which temporary practice may occur, and also paves the way definitions through judicial interpretation in concrete cases. We thus recommend that the rule contain no definition of "temporary practice."

B: Question Two: Should the Rule Include a Registration Requirement?

No registration requirement should be imposed. It would be a significant step backward, and frustrate the goals of the Temporary Practice Rule.

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[20] As noted, however, (*see* Executive Summary, *supra*, at p.2; *see also infra* at pp. 15 - 16) we recommend that the in-house counsel registration rule retain the more broadly adopted definition for foreign lawyers who come to New York as in-house counsel on a continuous or permanent basis. New York has a significant interest in protecting the public by insuring that these lawyers are regulated well beyond the monitoring provided by their employer-clients.

The home jurisdiction authorities will retain primary responsibility for regulating lawyers practicing temporarily in New York under this rule. Most of these lawyers will practice in New York only for the short-term or intermittently. Many of them will "fly in and fly out" for a few days --- or even for one day a year --- to perform services related to a matter and client based elsewhere. Setting up new procedures and an agency to discipline them would impose significant burdens and expense --- on the lawyers from outside New York and on the New York disciplinary system --- with no measurable protection for the public.[21] The rule should contain no registration requirement.

C. Question Three: Should There Be Additional Disciplinary Procedures?

No additional disciplinary procedures are needed. New York can discipline lawyers temporarily practicing in New York through the regular disciplinary machinery. And, as appropriate, the matter can then be sent to the lawyer's home jurisdiction for review.

The Temporary Practice Rule makes clear that the New York Rules of Professional Conduct apply to temporary practitioners and that they can be disciplined by the New York authorities.[22] The rules of each Department clearly establish that disciplinary prosecutors have power to enforce these rules against any lawyer who commits misconduct in New York, regardless of where the lawyer is admitted to practice.[23] Other states that have adopted temporary practice rules have imposed

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[21] Perhaps for these reasons, of the more than 40 jurisdictions that have adopted a temporary practice rule, including the 10 that embrace foreign lawyers, only a few have adopted some form of registration. *See, e.g. Connecticut R.P.C. 5.5(f)* http://www.jud.ct.gov/publications/PracticeBook/PB.pdf (last visited October 6, 2015) (requiring pre-and post-notifications and fees); *New Jersey RPC 5.5 (b) & (c) and NJR 1:20-1 (b) & (c)* (registration and fee required, but only for certain work); *New Mexico Rule and NMRA 24-106* (requiring registration fees for some services). Our review of these registration requirements reveals that they are cumbersome, uneven, and difficult to enforce. Most importantly they appear unnecessary. We have not heard reports of problems in the jurisdictions that do not have registration requirements.

[22] Proposed 22 NYCRR § 523.3 says: "A lawyer who practices law in this state pursuant to this Rule is subject to the New York Rules of Professional Conduct and to the disciplinary authority of this state . . . to the same extent as if the lawyer were admitted or authorized to practice in the state." *See also* NY R.P.C. 8.5(a) (out-of-state lawyer may be subject to disciplinary authority of this state and home jurisdiction); NY R.P.C. 8.5(b)(1) (lawyer admitted *pro hac vice* in New York subject to New York discipline); NY R.P.C. 8.5(b)(2) (out-of-state transactional lawyer subject to New York discipline if particular conduct has "its principal effect" in New York).

[23] *See*, 22 NYCRR § 603.1 (First Department; "[t]his Part shall apply to all attorneys who are admitted to practice, reside in, *commit acts in* or have offices in this judicial department. . . .") (emphasis added); 22 NYCRR § 691.1 (Second Department; same language); 22 NYCRR § 806.1 (Third Department; "[t]his Part shall apply to all attorneys who are admitted to practice, reside or have an office in, *or who are employed*

discipline on out-of-state lawyers who engage in misconduct within their borders.[24] No additional disciplinary procedures are necessary.

D. Question Four: Should the Rule Apply to Candidates Applying for Admission to the New York Bar?

In 2012 we recommended that New York adopt a rule permitting practice pending admission. We continue to believe New York should do so. Globalization, advances in technology, economic changes, and client demands have only intensified since then. There is even more cross-border practice today --- and a related need for lawyers to relocate from time to time.

A lawyer may need to relocate for many reasons beyond the lawyer's control. For example, a lawyer may need to move to New York in order to accommodate the needs of a client who has moved to a new jurisdiction. A lawyer may receive a job opportunity in, or may be transferred to, a jurisdiction other than the jurisdiction of original licensure --- often requiring relocation within a very short time. Lawyers sometimes have to relocate due to changes in personal circumstances, such as the relocation of a spouse or domestic partner, or due to military deployment. In a connected world, lawyers increasingly need to relocate during their careers, often more than once and frequently without sufficient notice to obtain bar admission before the move.

But we also believe that temporary practice pending admission is best established by a separate rule, not as part of new § 523. Lawyers who are permitted to practice pending admission seek to establish a continuous and permanent presence in New York. Indeed, practice pending admission may entail a continuous presence in New York for as long as a year.[25] By contrast, a temporary lawyer does not seek to establish a

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or transact business in, the third judicial department") (emphasis added); 22 NYCRR § 1022.1 ("[t]his Part shall apply to all attorneys who . . . practice within the Fourth Department").

[24] See, e.g., *See In re Gerber* 2015 WL 5016552 (N.D. 2015) (publicly admonishing a Minnesota lawyer who practiced law in North Dakota without securing temporary license to practice); *In re Kingsley*, 950 A.2d. 659 (DE 2008) (disciplining an out-of-state lawyer for practice in Delaware without seeking temporary admission or other authorized status); *In re Parilman*, 947 N.E.2d 915 (Ind. 2011) (barring Arizona lawyer who solicited clients in Indiana in violation of Indiana Rules from practicing in Indiana, including "temporary admission").

[25] For example, the process for admission without examination requires an applicant to prepare an application seeking personal and professional information that can take weeks or months to gather. See 22 NYCRR § 520.10(b). The process for seeking admission via the bar exam can take seven months or longer, in part because the bar exam is only given twice annually. Even then --- before formal admission --- a person who passes the bar exam must file an application with the appropriate Character and Fitness

continuous and permanent presence in New York. While relevant considerations overlap, there are sufficient differences, in our view, to warrant separate attention.

We urge the Court to adopt a rule permitting practice pending admission, like the one we proposed in 2012. We would be pleased to submit an updated report that could examine the experience of other jurisdictions and developments in this area since 2012.[26]

E. Question Five: Should the Rule Apply to Registered In-House Counsel and Licensed Legal Consultants?

It is not necessary to make the Temporary Practice Rule cover lawyers registered in-house counsel from other U.S. jurisdictions or licensed legal consultants. These lawyers will be able to practice temporarily in New York based on their home-state or home-country status. For example, a foreign legal consultant in Missouri who is admitted in England will be able to practice temporarily in New York based on his or her admission in England. If the Court adopts the In-House Counsel Amendments, it will

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Committee, submit to a personal interview, and attend a swearing-in ceremony. This time-consuming process can adversely affect the ability of a lawyer moving to New York in mid-career to represent existing clients effectively and can have adverse consequences on such a lawyer's career in a marketplace that requires an increasing amount of cross-border practice. A rule permitting practice pending admission would ease the disruptions for lawyers diligently pursuing admission.

[26] In particular, the ABA has adopted a model rule on practice pending admission. Some states have also adopted such rules. *See, e.g.,* District of Columbia Court of Appeals Rule 49(c)(8) http://www.dcappeals.gov/dccourts/docs/rule49.pdf (last visited October 7, 2015) (out-of-state lawyers may practice from a principal office located in D.C. for a period not to exceed 360 days if other requirements are met; court has asked for comments by November 11, 2015, on proposed revisions regarding, *inter alia*, in-house attorneys); Missouri Supreme Court Rule 8.06, http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/0/e0bcf992eb92f9ae86256db7007379ef?OpenDocument (last visited October 7, 2015) (similar to the D.C. Rule); Colorado Court Rule 205.6 http://www.courts.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2014/2014(09)%20clean.PDF (last visited October 7, 2015) (permits practice pending admission for up to 365 days); North Carolina Rule 5.5(e) http://www.ncbar.com/rules/rules.asp?page=47 (last visited October 7, 2015) (practice pending admission permitted only upon application, if the lawyer is licensed in a state that has a reciprocal provision and other requirements are met). See also, Kansas Court Rule 710 http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Admission+of+Attorneys&r2=427 (last visited October 7, 2015) (permitting practice pending admission, with conditions); North Dakota Court Rule 6.1. http://www.ndcourts.gov/court/notices/20130024/rule6.1.htm (last visited October 7, 2015) temporary practice pending admission, with conditions). The full text of the ABA Model Rule on Practice Pending Admission can be found here: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model_rule_practice_pending_admission.authcheckdam.pdf (last visited October 8, 2015). The full text of such rules from other jurisdictions can be found here: http://www.americanbar.org/groups/professional_responsibility/policy.html (last visited October 8, 2015).

not be necessary to apply the rule specifically to registered in-house counsel from foreign jurisdictions either. They will be able to practice based on their home-state admission.

V. The In-House Counsel Amendments

The In-House Counsel Amendments permit foreign lawyers to register as in-house lawyers. This is a welcome step forward, and in-line with significant precedent. As the September 24th OCA Memo notes, and in addition to the ABA Model Rules discussed throughout this report:

- The Conference of Chief Justices has recommended that states amend their in-house registration rules to permit registration by foreign lawyers,
- Fifteen jurisdictions have adopted rules permitting registration by foreign in-house counsel; and
- The NYSBA, NYC Bar Association, and the New York County Lawyers' Association issued a joint report (in November 2010) recommending that New York adopt rules permitting registration as in-house counsel by out-of-state and foreign lawyers.[27]

The In-House Counsel Amendments adopt the same definition of foreign lawyer as is currently in the New York Rule on Licensing Legal Consultants. The proposed definition is also consistent with the ABA's definition of foreign lawyers, and the definition used by many of the jurisdictions that have already adopted rules permitting registration by foreign in-house counsel.[28] We support this approach to the registration

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[27] September 24th OCA Memo at 1.

[28] *See, e.g., Connecticut Bar Examining Committee Rules* https://www.jud.ct.gov/cbec/housecounsel.htm#qualify (last visited October 2, 2015) (to register as an in-house counsel a lawyer must be "a member of the bar in good standing in another jurisdiction (state, DC, US territory or foreign country)"); *Georgia Rule Prof. C. 5.5(f) & (g)* *https://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=129* (last visited October 2, 2015) (the foreign lawyers must be "a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority"); *Iowa Rules on Admission to the Bar § 31.16(1)(d)* (the foreign lawyer must be "a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority"). Some rules specifically give their courts discretion to permit the registration of a foreign lawyer who does not meet a formal definition. See, e.g., *Delaware Rule 55.1* http://courts.delaware.gov/forms/download.aspx?id=39368 (last visited October 2, 2015) (to practice in-

of in-house counsel who will have a continuous and permanent presence in New York and believe that New York should use the same definition each time it uses the term "foreign lawyer" is referenced in our rules. This definition protects the public because it excludes from continuous or permanent practice in New York anyone who is not "admitted to practice" and not "subject to effective regulation."

However, and as set forth above, in-house counsel in many foreign jurisdictions, particularly in Europe, are not admitted to the bar and would apparently not qualify under this definition. We note that the ABA is currently studying ways to include in its in-house registration rules qualified in-house practitioners from Europe and elsewhere who are not called "lawyers" in their home countries and are not subject to any formal disciplinary or regulatory regimes. We think New York should consider such an addition as well. One possibility would be for New York to add language like the following to the In-House Registration Amendments: "The Appellate Divisions in each Department may, in their discretion, allow a lawyer lawfully practicing as in-house counsel in a foreign jurisdiction who does not meet all the requirements of this rule to register as an in-house counsel after consideration of other criteria, including the lawyer's legal education, references and experience." Other approaches may emerge. We expect to review the ABA's work and make further recommendations on this question when that work is completed.

VI. Conclusion

The NYSBA believes that the principles embodied by both the proposed Temporary Practice Rule and the proposed In-House Counsel Amendments are salutary and strongly endorses these initiatives by the Court. For the reasons stated in this Report, we offer the following specific recommendations and responses to the OCA's requests for comments:

- The proposed Temporary Practice Rule should be modified by replacing "admitted and authorized to practice law in another jurisdiction" with the definition of foreign lawyer that is currently in New York's Rule on Licensing Legal Consultants and is proposed for the In-House Counsel Registration Rule. This change would avoid potential ambiguity and align the Temporary Practice

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house "lawyers admitted to practice in a jurisdiction outside of the United States may apply individually to the Supreme Court for a Delaware Certificate of Limited Practice . . . ."). We propose that the New York Courts study this option, among others.

Rule with ABA Model Rules, such rules elsewhere, and the other New York rules addressing foreign lawyers which, among other things, require that the foreign lawyer be subject in their home countries to some kind of formal admission system and "effective regulation".

- The following phrase should be added to the opening paragraph of the proposed Temporary Practice Rule: "or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction" (see *supra* at pp. 10-11).
- The Temporary Practice Rule should not define "temporary practice."
- The Temporary Practice Rule should not include a registration requirement.
- No additional disciplinary procedures or bodies are necessary for the enforcement of the Temporary Practice Rule.
- The Temporary Practice Rule should not apply to candidates applying for admission to the New York bar. Lawyers permitted to practice pending admission would be seeking to establish a continuous and permanent presence in New York. By contrast, temporary lawyers do not seek to establish a permanent and continuous presence in New York. While some policy considerations regarding bar applicants and temporary lawyers may overlap, there are sufficient differences to warrant separate rules. Our 2012 recommendation for a rule permitting practice pending admission would recognize these differences. The NYSBA would be pleased to submit a supplemental report in light of developments since 2012.
- The Temporary Practice Rule should not apply to registered in-house counsel from other states or to licensed foreign legal consultants because these lawyers can practice temporarily in New York based on their home-state or home-country status. If the Court adopts the In-House Counsel Amendments, it will not be necessary to specifically apply the Temporary Practice Rule to registered foreign in-house counsel either.
- The In-House Counsel Amendments published for comment on September 24, 2015 should be adopted. The Court should then consider ways to make this rule

apply to in-house counsel from European and other jurisdictions who are not effectively regulated as "lawyers" in their home jurisdictions but who are otherwise sufficiently qualified to be registered in-house counsel in New York.

Dated: November 9, 2015

Respectfully submitted,

David P. Miranda, President
New York State Bar Association

New York State Bar Committee on Standards of Attorney Conduct

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Barbara S. Gillers, *Vice-Chair**

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(2)

NEW YORK CITY BAR

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REPORT BY THE PROFESSIONAL DISCIPLINE COMMITTEE, PROFESSIONAL ETHICS COMMITTEE AND PROFESSIONAL RESPONSIBILITY COMMITTEE

COMMENTS ON PROPOSED NEW SECTION 523 OF THE RULES OF THE COURT OF APPEALS AUTHORIZING THE TEMPORARY PRACTICE OF LAW IN NYS BY OUT-OF-STATE AND FOREIGN ATTORNEYS

The New York State Office of Court Administration has requested comments on Proposed New Section 523 of the Rules of the Court of Appeals Authorizing the Temporary Practice of Law in New York by Out-of-State and Foreign Attorneys (the "Proposed Rule") as set forth in the Memorandum from John W. McConnell dated September 4, 2015 and subsequently amended September 21, 2015 (the "Memorandum"). The New York City Bar Association (the "City Bar") supports this proposal for the reasons set forth herein.

WHY WE SUPPORT THE PROPOSED RULE

As the City Bar noted in its endorsement of a similar proposal in 2012, law practice has becoming increasingly national and global.[1] New York is a center of global commerce, yet it is one of only a handful of states that have not adopted rules permitting temporary practice. Adoption of the Proposed Rule will bring New York into line with the overwhelming majority of other jurisdictions that permit temporary practice by out-of-state lawyers.[2]

The types of activities permitted under the Proposed Rule are limited in scope, rendered either in association with a lawyer admitted to practice in this state or in connection with a proceeding or the lawyer's practice in another jurisdiction in which the lawyer is admitted. A lawyer engaged in temporary practice would be subject to the New York Rules of Professional Conduct and the disciplinary authority of the relevant Appellate Division. These requirements provide an added safeguard for the public and are preferable to the current situation where an out-of-state lawyer may be engaging in practice in New York but not be subject to any disciplinary authority here.

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[1] *See* Report of the New York State Bar Association, The New York City Bar Association, The New York County Lawyers' Association, June 15, 2012, which the City Bar again endorses. *Available at* http://www.nysba.org/workarea/DownloadAsset.aspx?id=34067.

[2] At least 46 jurisdictions have adopted rules permitting temporary practice by out-of-state lawyers. *See* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf.

Further, adoption of the Proposed Rule will clarify the circumstances in which out-of-state lawyers may lawfully provide temporary legal services in the State. New York, like other U.S. jurisdictions, regulates the practice of law through an admissions requirement and through various provisions of the Judiciary Law that prohibit the unauthorized practice of law ("UPL"). Specifically, Section 485 of the Judiciary Law makes violation of certain UPL restrictions a misdemeanor while Section 485-a makes violations of certain UPL restrictions a Class E felony. However, like most other U.S. jurisdictions, New York does not define what constitutes the "practice of law in New York." Thus, it is often difficult, if not impossible, for a lawyer to determine whether she is engaged in UPL. For example, in an era when virtual law practice is on the rise, is an out-of-state lawyer "practicing law in New York" when, while on vacation in the State, she advises a client in Hawaii on a Hawaiian transaction? And does the analysis change if that lawyer briefly discusses with the client whether New York law may apply to the transaction?[3]

Given that New York currently criminalizes UPL, and, in addition, that it is a violation of Rule 5.5(b) of the New York Rules of Professional Conduct for a lawyer licensed to practice in New York to "aid a nonlawyer in the practice of law," the Proposed Rule will provide an explicit safe harbor for temporary practice protecting not only out-of-state lawyers, but also New York lawyers who regularly or periodically work with them in the state. At the moment, lawyers who engage in activity which *might possibly be construed* as the practice of law in New York do so at the risk of being prosecuted. Although there is no trend of such prosecution, New York, as a true center for global commerce should not invite visiting lawyers to rely on an "implied safe harbor" in order to risk such activity but, rather, should provide them (and by extension their clients, and the New York lawyers with whom they associate) with an explicit safe harbor for temporary practice.[4]

SUGGESTED AMENDMENTS TO THE PROPOSED RULE

Although we endorse the Proposed Rule as written, we have the following suggested amendments:

(1) We propose changing "and" to "or" in the first line of the Proposed Rule so that it will read "[a] lawyer "admitted or authorized to practice law ...." Certain jurisdictions permit (and thereby "license") lawyers to practice in their jurisdiction without formal admission procedures.[5] So if, for example, a French lawyer is

[3] Even more confusing – some activities seem to be treated as the practice of law when performed by a lawyer (for example, assistance with a tax issue) yet nonlawyers are permitted to perform such services without being deemed to engage in UPL.

[4] The Proposed Rule provides an additional benefit for New York lawyers to the extent that reciprocity is required for temporary practice in another jurisdiction. *See* Conn. R.P.C. 5.5(c) (permitting temporary practice only for lawyers admitted in another U.S. jurisdiction "which accords similar privileges to Connecticut lawyers in its jurisdiction.").

[5] *See, e.g.*, N.Y. State 815 (2007) ("A New York lawyer who is permitted by the law of a foreign jurisdiction to engage in conduct in a foreign jurisdiction that would constitute the practice of law if undertaken in New York, even though the lawyer is not formally admitted to practice law, is "licensed to practice" in that jurisdiction").

permitted by the United Kingdom to assist with a transaction of UK focus, we believe that if that transaction gives rise to a New York issue, such temporary practice in New York would merit protection as well.

(2) For the same reason, we propose adding "or authorized" after "admitted" in sections (c) and (d).

(3) In section (c), we propose deleting "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and." Courts in New York have recognized that participation in arbitration or other alternative dispute resolution procedures by an out-of-state lawyer should not be deemed UPL.[6] The suggested change will clarify that the Proposed Rule is not intended to limit this principle.

RESPONSES TO THE FIVE ISSUES HIGHLIGHTED BY THE OFFICE OF COURT ADMINISTRATION

The Office of Court Administration asked for responses to five specific questions. The City Bar considered these issues and has the following responses:

1. Should there be a definition of "temporary practice", and, if so, what definition?

New York has not comprehensively defined the temporary "practice of law in New York", and the City Bar does not believe it is feasible to attempt to define all circumstances that would constitute the "temporary practice" of law under the Proposed Rule. We believe the concepts are so complex and varied that any attempt to incorporate an all-inclusive definition would likely derail the larger purpose of the Proposed Rule. It is better left to the courts and other tribunals to define incrementally as questions arise. To the extent that some guidance is necessary, because the Proposed Rule is very similar to ABA Model Rule of Professional conduct 5.5, we recommend that the relevant Comments to ABA Model Rule 5.5 be considered when interpreting the Proposed Rule. This will serve the underlying purpose of the Proposed Rule by helping clarify for tribunals and attorneys the circumstances in which out-of-state lawyers may lawfully provide temporary legal services in New York.

2. Should there be a registration requirement?

The City Bar weighed the benefits and burdens of a registration requirement and concluded that it is not necessary. We are aware that some other jurisdictions have implemented additional registration requirements by out-of-state lawyers temporarily practicing in such jurisdictions.[7]

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[6] *See Prudential Equity Group, LLC v Ajamie,* 538 F. Supp. 2d 605 (S.D.N.Y. 2008); *Williamson v. John D. Quinn Constr. Corp.,* 537 F. Supp. 613 (S.D.N.Y. 1982).

[7] *See e.g.*, Rule 1-3.11 of the Rules Regulating The Florida Bar, requiring out-of-state lawyers appearing in domestic arbitrations to, *inter alia*, file a registration statement with The Florida Bar and pay a fee; Rule 404(l) of the South Carolina Appellate Court Rules, requiring the out-of-state lawyer to, inter alia, file a verified statement with the South Carolina Supreme Court Office of Bar Admissions and pay a fee; and Rule 1.2 of the Rules of Practice of the

These requirements, however, appear to us to be burdensome for out-of-state lawyers and are not supported by compelling evidence that the registration requirements actually assure increased compliance with temporary practice obligations. We believe that a registration requirement would result in time-consuming paperwork with little benefit and cut against the goal of "seamless" multi-jurisdictional practice.

3. Should there be procedures to assure fulfillment of disciplinary responsibilities?

No. We believe that the Proposed Rule, together with existing disciplinary procedures, is sufficient to enforce compliance with temporary practice obligations. In particular, we note that Proposed Rule Section 523.3 provides that a lawyer practicing in New York pursuant to the Rule is subject to the New York Rules of Professional Conduct and to the New York disciplinary authorities. Thus, a complaint made to the New York disciplinary authorities regarding a lawyer admitted in another state, but not New York, may be adjudicated in New York, or referred to disciplinary authorities in such lawyer's jurisdiction of admission.

Further, for out-of-state lawyers who seek to practice temporarily before a New York tribunal, the tribunal itself may regulate the lawyer's temporary practice through its *pro hac vice* procedures and as part of its inherent power to regulate the practice before the tribunal and protect the integrity of its proceedings. Accordingly, we do not believe that there should be additional procedures implemented in New York to assure fulfillment of disciplinary responsibilities.

4. Should the rule apply to candidates applying for admission to the NY Bar? If so, how?

A good case could be made for providing a safe harbor for such candidates in certain circumstances but perhaps this issue should be left for a separate initiative and analysis.

5. Should the rule apply to registered in-house counsel and licensed legal consultants?

Registered in-house counsel and licensed legal consultants should be included if they qualify under the Proposed Rule.

* * * * *

The City Bar strongly supports the Proposed Rule. It will provide clarity to lawyers and clients while enabling New York to discipline and regulate those out-of-state lawyers engaged in the temporary practice of law in New York. Further, it will underscore and enhance New York's role as a leading global center and enable it to join the ranks of the 46 U.S. jurisdictions that

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Supreme Court of Ohio, requiring out-of-state attorneys seeking permission to appear *pro hac vice* in an Ohio proceeding to first register with the Supreme Court Office of Attorney Services and pay a fee

permit the temporary practice of law within their borders. We urge adoption of the Proposed Rule.

October 2015

Professional Discipline Committee
Devika Kewalramani, Chair

Professional Ethics Committee
Nicole Hyland, Chair

Professional Responsibility Committee
Meredith Heller, Chair

Authoring Subcommittee
Alison Besunder
Robert Garner
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NEW YORK COUNTY
NYCLA
LAWYERS' ASSOCIATION

Ronald C. Minkoff
Chair
Task Force on Professionalism

November 3, 2015

COMMENTS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION TASK FORCE ON PROFESSIONALISM REGARDING PROPOSED NEW SECTION 523 OF THE RULES OF THE COURT OF APPEALS

The New York State Office of Court Administration has requested comments on Proposed New Section 523 of the Rules of the Court of Appeals Authorizing the Temporary Practice of Law in New York by Out-of-State and Foreign Attorneys (the "Proposed Rule"), as set forth in your Memorandum dated September 24, 2015. The Task Force on Professionalism (the "Task Force")[1] of the New York County Lawyers Association has reviewed the Proposed Rule, as well as the Comments concerning the Proposed Rule submitted by the New York State Bar Association (the "NYSBA Comments"). The Task Force enthusiastically supports the Proposed Rule, subject to the various suggestions contained in the NYSBA Comments, with which the Task Force also agrees. Rather than repeat the NYSBA Comments, we incorporate them by reference herein.

The Proposed Rule will provide clearer guidance to New York and out-of-state lawyers as to the propriety of cross-border practice, and bring New York into line with 46 U.S. jurisdictions, including all our neighboring states, in this important area. We look forward to the adoption of the Proposed Rule, which will help ensure that New York remains a center of global commerce while protecting the public with a regulatory scheme regarding lawyers who cross our borders to practice here.

[1] The views expressed are those of the Task Force on Professionalism only, have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.

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To: **John W. McConnell. Esq.**
Counsel's Office, Office of Court Administration

From: **Committee on Professional Standards**
Appellate Division, Third Department

Re: **Proposed New Section 523 of the Rules of the Court of Appeals Authorizing the Temporary Practice of Law in New York by Out-of-State and Foreign Attorneys**

Date: **November 3, 2015**

The Committee on Professional Standards ("Committee") respectfully submits the following comments regarding the proposed new section 523 of the Rules of Court of Appeals Authorizing the Temporary Practice of Law in New York by Out-of-State and Foreign Attorneys ("Temporary Practice Rule" or "New Rule").

1. The Committee is opposed to the proposed new Temporary Practice Rule and has several concerns regarding it.

2. The Committee believes that, for an attorney, it is a privilege to have been admitted to the practice of law in New York State and with said privilege comes the obligations to register, pay required registration fees, and obtain all necessary CLE credits as mandated by the Courts.

a. It is unfair to all those attorneys who adhere to the obligations associated with the privilege to practice law in New York State, to allow foreign and out-of-state (collectively, "OOS") attorneys to be granted the same privilege to practice law in New York State, even if for a temporary period, without having any of the associated obligations of attorneys admitted to practice in the State ("admitted attorneys").

b. Admitted attorneys should not have to financially subsidize OOS attorneys' practice of law in the State.

2. The Temporary Practice Rule §523.2 provides, in part, "A lawyer admitted and authorized to practice law in another jurisdiction within or outside the United States who is not disbarred or suspended from practice in any jurisdiction, may ...".

   a. The Committee suggests that the proposed language is too broad and should be further limited to include only those OOS lawyers who "do not have a pending disciplinary investigation and/or proceeding against them by any foreign jurisdiction and/or have not been arrested, pled to, or been convicted of a felony or serious crime."

3. The Committee believes that there must be basic rules governing OOS attorneys temporarily practicing in the State and that the proposed New Rule fails to address this important need.

   a. There must be some form of registration for OOS attorneys while temporarily practicing in the State and at a minimum, advance written notification to either or both the Office of Court Administration (OCA) and the Court having jurisdiction over the transaction. If not, there will be absolutely no means by which the Courts, attorney grievance committees, legal consumers, and the public, will be aware that an OOS attorney is practicing in the State, or whether the OOS attorney meets the statutory requirements of the New Rule. Without some kind of registration there would be no means by which the Courts or attorney grievance committees could monitor the practice and conduct of the OSS attorneys, nor, most importantly, would basic information, including name, business address, email address, and telephone number of the OOS attorney, be available by which attorney grievance committees and legal consumers could contact an OOS attorney, if necessary, while temporarily practicing in the State or after that practice has concluded.

i. If there is no registration requirement and therefore, no basic information regarding the OOS attorney, it will be impractical, if not impossible, for in-state attorney grievance committees to process complaints of professional misconduct against OOS attorneys. With respect to admitted attorneys practicing outside the state and country, it is difficult, at times, for attorney grievance committees to contact or serve notice on said attorneys, because said attorneys do not maintain a current address with OCA. Most likely, if there is no registration requirement for OOS attorneys, it will be difficult or impossible in many cases to contact and/or serve notice on OOS attorneys, if necessary. This would impose an undue burden on the attorney grievance committees, and would cause already scarce resources to be diverted to futile efforts at tracking such elusive OOS attorneys.

b. If the New Rule were adopted, Rule 8.5 (Disciplinary Authority and Choice of Law) of the Rules of Professional Conduct, would have to be amended to include OOS attorneys.

c. The term, "temporary practice", must be defined so that the courts, attorney grievance committees, legal consumers, and the public, would know the exact nature of the legal matter and the duration of the time period in which the OOS attorney is allowed under the New Rule to legally be able to practice within the State.

d. If there is no requirement of registration and no definition of the term, "temporary practice", OOS attorneys have an unconditional and open-ended ability to practice law in New York with respect to whichever legal matter or matters they choose, without any accountability to the courts, the attorney grievance committees, legal consumers and the public.

4. The Committee is concerned that legal business and transactions typically handled by admitted attorneys will be handled by OOS attorneys, thereby reducing the number of legal business and transactions performed by admitted attorneys and increasing the competition for legal business opportunities for admitted attorneys.

a. For example:

i. Real estate closings involving real estate properties across the state, many of which are owned or are purchased by out-of-state persons, may no longer be handled by admitted attorneys and instead, will be handled by OOS attorneys.

ii. Estate planning and estate administration matters which can only be handled by admitted attorneys could be handled by OOS attorneys under the New Rule, thereby reducing the need for admitted attorneys to handle these matters.

iii. There are currently rules of bordering states (i.e. Pennsylvania) which prohibit admitted attorneys from handling certain matters (i.e. hydrofracking matters) within the bordering states unless they are admitted also in the bordering states. The proposed New Rule contains no mutual prohibition, thereby allowing OOS attorneys to all handle matters in the foreign state and in New York, but excludes admitted attorneys from doing the same in bordering states.

5. The Committee is concerned that OOS attorneys handling legal issues and matters requiring concentration in specific areas of practice may not have the specific training and skill levels as admitted attorneys, thereby creating concerns as to the competency of the OOS attorneys.

   a. Rule 1.1(a) of the New York Rules of Professional Conduct provides that an attorney should provide competent representation to a client. The Committee's concern is that OOS attorneys, with no legal training or background in certain areas of both procedural and substantive New York law will not have the requisite skill and ability to effectively represent clients as would admitted attorneys.

   b. An OOS attorney may be familiar and competent with certain practice areas within their jurisdiction, but may not be while practicing in specific practice areas in New York (i.e. environmental, criminal and employment matters). Will OSS attorneys have the requisite skill and ability about local customs and New York rules and laws regarding these areas of practice?

6. The Committee is concerned that the imposition of discipline on OOS attorneys by in-state Courts and attorney grievance committees would be limited and not effective.

   a. Although §523.3 provides that OOS attorneys are, "subject to the New York Rules of Professional Conduct ... to the same extent as if the lawyer were admitted or authorized to practice in the state.", this is not accurate.

   b. For example: If a disciplinary proceeding is commenced against an OOS attorney for the misappropriation or conversion of client funds and the Court makes a finding of professional misconduct, and imposes public discipline, most significantly, an order of suspension or disbarment, we believe the Court would not have jurisdiction to do so since the OOS attorney is not admitted to practice in New York. Further,

and on the same basis, how would the Court impose an interim suspension against an OOS attorney?

c. Will OOS attorneys be subject to the various sections of the Judiciary Law? For example, Section 90(c)(4) requiring the reporting of felony and serious crime convictions both in-state and in foreign jurisdictions?

Respectfully submitted,

Samantha Holbrook

Samantha Holbrook, Chairperson
Committee on Professional Standards

(5)

John W. McConnell

From: Jim Jones <jim.w.jones2011@gmail.com>
Sent: Tuesday, November 3, 2015 2:02 PM
To: rulecomments
Subject: Comments on Proposed New Section 523 of the Rules of the Court of Appeals Authorizing the Temporary Practice of Law in New York by Out-of-State and Foreign Attorneys
Attachments: New York -- Comment Letter Supporting Proposed Rule Change re Temporary Practice of Law -- FINAL -- 11-3-15.pdf

Dear Mr. McConnell -- I have been requested by several members of a Law Firm General Counsel Roundtable for which I serve as moderator to submit the attached comment letter on the proposed new Section 523 of the Rules of the Court of Appeals. Thank you for the opportunity to comment on this important proposal.

James W. Jones

Senior Fellow
Center for the Study of the Legal Profession
GEORGETOWN UNIVERSITY LAW CENTER

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November 3, 2015

John W. McConnell, Esquire
Counsel
Office of Court Administration
25 Beaver Street (11th Fl.)
New York, N.Y. 10004

Re: Rule 523 Proposal

Dear Mr. McConnell:

We, the undersigned, are partners and senior lawyers in large law firms all of which have offices in New York as well as in multiple other jurisdictions both within and outside the United States. Some of us serve as general or associate general counsel of our firms, while others serve in ethics and risk management roles. Most of us bear some responsibility for ensuring that lawyers in our firms fully comply with the practice requirements of multiple jurisdictions in respect of their work for clients on matters that span jurisdictional boundaries.

We are writing in response to the September 4, 2015 Request for Public Comment on Proposed New Section 523 of the Rules of the Court of Appeals Authorizing the Temporary Practice of Law in New York State by Out-of-State and Foreign Attorneys. We all fully support and endorse the adoption by New York of a rule that permits the temporary practice of law in New York State by out-of-state and foreign lawyers along the lines set out in proposed new Section 523.

At the same time, however, we also urge consideration of an addition to the language of the proposed rule to deal with another circumstance that frequently arises in today's digital world, namely the use of remote technology that enables lawyers to work on matters exclusively relating to the work they normally perform in their home jurisdictions while physically located elsewhere. Examples of this include lawyers who live or are present on a more than temporary basis (such as owning a vacation home) in one jurisdiction, for example New York, but practice in another, be it a neighboring state like New Jersey or Connecticut, or a distant jurisdiction. Lawyers in this situation cannot be said to be in the state "temporarily," but are nevertheless not practicing, seeking to practice, or holding themselves out as practicing New York law. Nevertheless, because they are *physically* located in New York, under existing rules they may be technically practicing law in New York, and yet they would not be aided by the proposed new Rule.

Notably, this situation was recently addressed in Arizona. That state just adopted a temporary practice rule in its Rules of Professional Responsibility, ER 5.5, entitled "*Unauthorized Practice of Law; Multijurisdictional Practice,*" in almost identical language to that of proposed Section 523, but with an additional provision which states that:

> (d) A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction, may provide legal services in Arizona that exclusively involve federal law, the law of another jurisdiction, or tribal law.

Consistent with that approach, we suggest that New York consider the following underlined changes to Proposed Section 523:

> § 523.2 Scope of temporary <u>and multijurisdictional</u> practice – general
>
> (a) A lawyer admitted and authorized to practice law in another jurisdiction within or outside the United States, who is not disbarred or suspended from practice in any jurisdiction, may provide on a temporary basis in this state legal services that the lawyer could provide in such jurisdiction (and that may generally be provided by a lawyer admitted to practice within this state) and:
>
> (1) are undertaken in association with a lawyer who is admitted to practice in this state and who actively participates in, and assumes joint responsibility for, the matter;
>
> (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer or a person the lawyer is assisting is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; or
>
> (3) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or
>
> (4) are not within paragraph (2) or (3) of this Rule and arise out of are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
>
> (b) <u>A lawyer admitted and authorized to practice law in another jurisdiction within the United States, who is not disbarred or suspended from practice in any jurisdiction, may provide in this state legal services that exclusively involve federal law, the law of another jurisdiction, or tribal law, provided that the lawyer does not hold himself or herself out in any way as having an office for the practice of law located in this state.</u>

In this way, lawyers admitted in a U.S. jurisdiction who are legitimately residing or staying in New York other than temporarily, but who are not holding themselves out as practicing New York law, and who are in fact not engaged in practicing New York law, but rather are using technology to enable them to practice remotely as if they were physically in their state of

admission, would also be protected from unwarranted accusation of engaging in the unauthorized practice of law. Foreign lawyers would be excluded from this part of the rule so as not to dilute the Foreign Legal Consultant rule that is designed to deal with those situations.

Respectfully submitted,

Thomas Browne
General Counsel
Hinshaw & Culbertson LLP

Eve Coddon
General Counsel
Paul Hastings LLP

Martin Checov
General Counsel
O'Melveny & Myers LLP

Steven M. Collins
General Counsel
Alston & Bird LLP

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Baker & McKenzie International

Roger D. Feldman
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Charlotte Moses Fischman
General Counsel
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Sheppard, Mullin, Richter & Hampton, LLP

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(6)

The Lawyers' Fund for Client Protection

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October 29, 2015

John. W. McConnell, Esq., Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

RE: Proposed Part 523
Rules of the Court of Appeals Regarding
Temporary Practice

Dear Mr. McConnell:

On behalf of our Board of Trustees, I write to comment on the Proposed Rule 523 of the Court of Appeals which would authorize out-of-state and foreign attorneys to temporarily practice law in New York State.

The proposal raises a client protection issue which concerns our Trustees.

Section 468-b of the Judiciary Law and the Trustees' Regulations authorize the Trustees to reimburse client losses caused by dishonest conduct of attorneys "admitted to practice" in New York State.

Out-of-state and foreign attorneys who would be authorized to temporarily practice in New York State under this proposed rule would not technically be considered "admitted to practice" in New York State. Therefore, any potential client losses due to dishonest conduct by a temporary practice attorney would not appear to be eligible for reimbursement from the New York Lawyers' Fund.

The proposed conditions under which temporary practice would be allowed have been referred to as safeguards for the public. These conditions do not ensure that a client loss will not occur due to dishonest conduct by a temporary practitioner nor do they provide financial protection for any potential client losses.

The same client protection concern would apply if the proposed rule were to apply to candidates applying for admission to the New York bar.

We are not aware of any law client losses which have resulted from dishonest conduct by temporary practitioners in the 44 jurisdictions which have instituted multi-jurisdictional rules of practice. Our Trustees though wish to be proactive and alert the Court to the potential harm to legal consumers in New York State from this possible gap in law client protection.

It is our understanding that the assumed client protection remedy under multijurisdictional rules elsewhere is that the home state of the temporary practitioner would accept jurisdiction and be the source of reimbursement for any client losses. I wish to point out that even if a home state fund does accept jurisdiction there is a wide disparity in the level of client protection and available reimbursement among our nation's client protection funds.

Please feel free to contact me if you have any questions or would like any further information.

Our Trustees appreciate this opportunity to bring to your attention their client protection concern.

Very truly yours,

Timothy O'Sullivan
Executive Director

TO/hrt

(7)

STEPHEN GILLERS
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VIA Mail and Email

September 21, 2015

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Dear Mr. McConnell:

I am commenting on the proposal to add Part 523 to the Court of Appeals' rules.

I was a member of the ABA's Multijurisdictional Practice Commission (2000-2002) and participated in drafting ABA Rule 5.5(c) and Rule 5.5(d). All of the MJP Commission's recommendations were adopted. I was also a member of the ABA's 20/20 Commission (2009-2013), which recommended amendments to Rule 5.5 among other proposals (all adopted).

Section 523.2 includes lawyers from "outside the United States" so long as they are "admitted and authorized" to practice law in their home countries. I suggest that this language is too broad and creates a serious risk to the public. In some countries, a person may practice law without taking a bar examination, without a legal education, without submitting to a character investigation, or with no effective professional regulation. Yet these lawyers can legitimately claim that they are "admitted and authorized," a term that the Court's proposal does not define. As such, they will be able to represent New York residents on the laws of New York or any U.S. or foreign jurisdiction, not only their own.

The MJP Commission proposed (and the ABA House of Delegates adopted) a slightly different model court rule for temporary practice by a "foreign lawyer," a defined term. It is Exhibit F to your notice.[1] The ABA took its definition from the ABA's Model Foreign Legal

[1] The scope of practice authority in the ABA rule is slightly narrower than in the proposal for matters not before a tribunal. Compare ABA Rule at (a)(4) with §523.3 (d). However, and to compensate, the ABA rule permits

Consultant (FLC) rule. The New York FLC rule uses the same definition.[2] It should be used in Part 523.

This definition assures that a non-United States lawyer temporarily here is "subject to effective regulation and discipline by a duly constituted professional body or a public authority." The fact that the foreign lawyer who is temporarily in New York may be subject to discipline in New York, as the Court's proposal envisions, is insufficient to protect the public. If there is no effective regulator in the lawyer's home jurisdiction, discipline in New York may mean little.

I realize that the New York *pro hac vice* rule allows admission of a lawyer from a "foreign country," with no further definition. Section 520.11(a)(1). Perhaps there should be one. The ABA *pro hac vice* rule has one. In any event, the lawyer has to apply for *pro hac vice* admission and ordinarily must affiliate with a local lawyer. A court will pass on the lawyer's qualifications in exercising discretion. Further, lawyers who appear in a tribunal are subject to the supervision of a judge. And *pro hac vice* admission can be withdrawn.

On another matter: ABA Rule 5.5(d), the so-called "in-house" admission rule, authorizes permanent (not temporary) presence in the State during the lawyer's period of employment. The ABA rule is broader than the New York in-house admission rule because it extends in-house authority to foreign lawyers (as defined in Rule 5.5(e)[3]). The current New York in-house rule does not do that. Part 523 is not the place to make the change. The current New York in-house admission rule is the place. The change would be beneficial. The clients of in-house lawyers are sophisticated. If a foreign company wants to send one of its lawyers to New York to work in-house at its counsel's office here, it should be able to do so.[4]

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temporary presence to advise on "international law or the law of a non-United States jurisdiction." In addition, §523.2(b) is broader than ABA Rule (a)(2). The latter is limited to pending or contemplated litigation outside the United States. The former applies to litigation "in this or another jurisdiction." Since New York permits foreign lawyers to appear *pro hac vice*, the proposed language makes sense.

[2] Section 521.1 of the Court's foreign legal consultant rule defines a foreign lawyer this way:

> (a) In its discretion the Appellate Division of the Supreme Court, pursuant to subdivision 6 of section 53 of the Judiciary Law, may license to practice as a legal consultant, without examination, an applicant who:
>
> (1) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority...

[3] Rule 5.5(e) uses the same definition of "foreign lawyer" as I urge here. In other words, the ABA uses this definition for its in-house rule, its temporary presence rule, its *pro hac vice* rule, and its FLC rule.

[4] I call to your attention a current discussion at the ABA and in the profession. In some nations, including in Europe, a lawyer who works in-house is not subject to discipline as a member of the bar. So the ABA's definition of "foreign lawyer" would exclude them. The current discussion is about whether and how to expand the definition of foreign lawyer to include in-house lawyers abroad, as appropriate, without making it so broad that anyone can plausibly

In answer to three of the questions you pose:

The rule should not contain a definition of "temporary practice." No bright line definition is workable. A lawyer may be here temporarily for many months during the course of preparing for and participating in a litigation or arbitration. Another lawyer may be here a week to negotiate a contract. The MJP Commission's comment [6] to Rule 5.5[5] was seen to suffice and there has been no problem with the use of the word in the last dozen years.

There should not be a registration requirement for temporary practice. A registration requirement is antithetical to the realities of temporary practice, which may entail presence here for a couple of days, sometimes with little notice.

There is no reason to include in-house counsel in the Court's rule because in-house counsel now have their own rule, which allows permanent presence in the state. An in-house lawyer may apply for *pro hac vice* admission and so does not need §523.2(b). See further above on including foreign lawyers in the in-house rule.

Please feel free to let me know if I can be of any further assistance.

Sincerely,

Stephen Gillers

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claim to be a lawyer within the definition. I suggest that New York await the outcome of this discussion before addressing the issue.

[5] Comment [6] provides: "There is no single test to determine whether a lawyer's services are provided on a 'temporary basis' in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be 'temporary'even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation."

(8)

John W. McConnell

From: cfbird
Sent: Friday, October 23, 2015 8:06 PM
To: rulecomments
Subject: Negative Opinion

I disagree with this proposed change. Why should foreign attorneys be on the same footing with American attorneys in America unless they have the same credentials....in house or otherwise. If they have a comparable education and can pass the New York State Bar, sure, let them practice. I see this same rationale with other changes in America and I don't agree with any of them, whether it is teachers or attorneys or any other profession.

Thank you,

C.F. Bird, J.D.

(9)

John W. McConnell

From: Joan Hannon
Sent: Thursday, September 17, 2015 5:51 PM
To: rulecomments
Subject: Proposed rule on temporary admission

I have just read the article in the New York Law Journal regarding a proposed rule to allow out-of-state and foreign lawyers to temporarily practice law in New York. Why is this rule needed? We already allow pro hac vice admission, which requires court approval. Will temporary practice also require court approval, and who will oversee these temporary practitioners? What safeguards will be in place to ensure that they do not come to New York to practice temporarily and stay without ever being admitted? With the adoption of the uniform bar exam and this rule, it seems to me that New York is opening its doors to out-of-state lawyers who are unfamiliar with New York practice. Encouraging out-of-state and foreign lawyers to come to New York to practice without stringent admission requirements waters down the New York brand and takes business away from New York lawyers. Passing the New York bar and being admitted in New York will no longer be a badge of honor. Anyone with a law degree will be able to come into New York and practice. Such rules do not protect the public. Joan L. Hannon, Esq.

(10)

John W. McConnell

From: John
Sent: Tuesday, November 3, 2015 5:09 PM
To: rulecomments
Subject: Comment on proposed rule 523.2

To whom it may concern,
I am writing in my personal capacity, and my views are my own, and are not meant to represent my employer in any way. I wish to comment upon the proposed rule 523.2, which proposed the temporary authorization of attorneys to practice in New York. I noticed that the rule does not define how long the temporary practice of law could be. I think it would be wise to provide some guideline or definition as to how long an attorney could practice in New York on a temporary basis. The pro hac vice rules require a judge to allow an outside attorney to practice before the court, while this proposed rule place that determination in the lawyer or their employer directly. With transactional work, there would not be any court rooms or judges involved, so there would potentially be no points of interaction with the judicial system and thus little oversight. I am not sure what role the bar or court would have in overseeing outside lawyers. For example, I wonder if client security funds would be available in the event of an act of malpractice by outside attorneys. I think it might be wise to consider a mechanism to determine if a temporary placement is repeatedly renewed such that it becomes permanent. Again, having a definition or distinction between a temporary and longer-term practice may be helpful. I think it might make sense to have outside attorneys practicing in New York temporarily notify the bar that they are doing so.

Additionally, some tightening of the language relating to geography may be helpful. Specifically, the proposed rule states "...may provide on a temporary basis in this state legal services..." Under a traditional model, legal services were performed where they were received. Perhaps that was still the case in 2002, when the model rule on this was proposed. However, today, services may be provided from other states or countries and received in New York. You may want to think about whether or not you value the location of where the services are performed, particularly with respect to the reach of New York law and judgments in the event of a dispute over those services.

Thank you for taking the time to read through my comments.
Best Regards,
John Stephens

Association of Corporate Counsel

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November 9, 2015

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
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Re: Proposed amendment of 22 NYCRR Parts 522 and 523 of the Rules of the Court of Appeals

Dear Mr. McConnell:

The Association of Corporate Counsel ("ACC"), our New York chapters, and the 20 chief legal officers from the New York companies listed below are writing to express our strong support for the amendments to Parts 522 and 523 of the New York Court of Appeals rules that would allow foreign lawyers to practice as in-house counsel in the state of New York, both on a long-term (Part 522) and temporary (Part 523) basis.

There are currently 21 U.S. jurisdictions that allow foreign lawyers to either practice temporarily in the jurisdiction or permanently as in-house counsel.[1] Given New York's position as a center of global commerce, New York's absence from this group is conspicuous. The proposed amendments to Parts 522 and 523 present an opportunity to rectify this outlier status and reinforce New York's commitment to being a business-friendly state. We also encourage the New York Court of Appeals to adopt a more inclusive definition of foreign lawyers under these rules so that lawyers from foreign jurisdictions where in-house counsel are not allowed to be admitted members of the bar (but who are authorized to provide legal services in-house) may practice in-house in New York.

I. About ACC and its New York Chapters

ACC is a global bar association that promotes the common professional and business interests of in-house counsel, with more than 40,000 members employed by over 10,000 organizations in more than 75 countries. For years, ACC has worked to remove unnecessary barriers within the United States and around the world that prevent in-house lawyers from working where their employers need to send them. ACC played a critical

[1] See, "Jurisdictions with Rules Regarding Foreign Lawyer Practice," prepared on Oct. 13, 2015 by Prof. Laurel Terry, Dickinson School of Law, Pennsylvania State University. Available at: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_8_9_status_chart.authcheckdam.pdf. Also, on October 15, 2015, the Illinois Supreme Court entered an order amending its rules to allow foreign in-house counsel to practice in the state.

role in supporting the original version of ABA Model Rule 5.5(d), which allowed U.S. companies to employ in-house lawyers whose law licenses come from other U.S. states. ACC also worked with the ABA's Commission on Ethics 20/20 as it proposed amendments to the Model Rules, including the expansion of ABA Model Rule 5.5 to include foreign in-house lawyers.

ACC's three New York chapters represent Central and Western New York, Greater New York, and Westchester County (with part of Connecticut). These chapters have more than 2,300 in-house counsel members in New York representing leading local, national and international companies. The chapters are dedicated to serving the needs and interests of the in-house counsel community in New York by promoting education, diversity, and opportunities for in-house counsel to work on pro bono matters. The chapters have supported past efforts to expand the ability of lawyers licensed in other states to practice as in-house counsel in New York and provide pro bono services.

II. The Global Nature of New York's Economy Makes Foreign In-House Lawyers a Valuable Resource for New York Businesses

No one needs to tell the state of New York about the global nature of today's business world and the need for lawyers to be able to cross international borders to serve their business clients. New York is home to 54 of the world's Fortune 500 companies, the most of any U.S. state. It is the third largest economy in the United States and if it were a country, it would have the 14th largest economy in the world. International trade is a fixture of the New York economy – according to the U.S. Department of Commerce, New York has over $88 billion statewide in international exports, and more than 40,000 New York companies are involved in exporting goods out of the state.[2] As business issues cross borders, so do legal issues.

A rule that allows foreign in-house lawyers to freely serve their corporate employers in New York will enhance New York's stature as a center of global commerce. In 2010, three of New York's largest bar associations recognized the need for foreign lawyers to be admitted as in-house counsel in New York when they recommended that the New York Court of Appeals adopt a proposal similar to the Part 522 and 523 amendments currently under consideration. The bar associations noted that New York's outlier status on the issue "undermines the State's position as a business and non-profit capital of the world."[3]

The international nature of New York's economy is reflected in the issues faced by its in-house lawyers. Based on an analysis utilizing data from the 2015 ACC Global Census of in-house lawyers, 62 percent of respondents from New York reported having cross-border or multi-national work responsibilities. New York in-house lawyers also reported,

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[2] "New York Exports, Jobs, and Foreign Investment," prepared by the Office of Trade and Economic Analysis, International Trade Administration, U.S. Department of Commerce. Available at: http://www.trade.gov/mas/ian/statereports/states/ny.pdf.

[3] "Proposed Rules for Licensing of In-House Counsel," November 2010, New York State Bar Association, New York City Bar Association, New York County Lawyers' Association, p. 4.

on average, having about a third of their workload involve cross-border or multi-national issues. ACC's general counsel members have told us that restrictions on bringing foreign in-house counsel to practice in the United States makes it harder for multi-national companies to leverage the full experience of their in-house legal departments. Foreign lawyers working for the company abroad will have different subject matter expertise than their U.S. counterparts, but unlike foreign outside counsel, will still have history with the company and familiarity with the company's risk profile and governance procedures. U.S. restrictions on foreign in-house counsel also mean that a company cannot bring its foreign lawyers to the United States so they can assist more closely on U.S. legal matters. Working on U.S. legal matters alongside the company's U.S. attorneys would help the foreign lawyers learn the U.S. laws that affect the company. As the foreign lawyers gain competence in the U.S. laws, they will be able to work on U.S. matters independently and carry that ability with them when they work abroad. We note that the New York proposal is especially well-suited for this type of educational experience because it does not limit foreign lawyers working on U.S. legal matters to doing so only "based upon the advice" of a lawyer who is licensed in the relevant U.S. jurisdiction to provide such advice.

III. The Proposed Amendments to Parts 522 and 523 Present Little Risk of Harm to the Public or the Legal Profession While Helping to Meet the Needs of New York Businesses

In 2011, New York adopted a rule allowing a limited New York law license for in-house lawyers licensed in other U.S. states. We are unaware of any ill effects stemming from adoption of this rule, and in fact have heard from our New York members that clarity as to their practice status was a welcome change. We believe the same effects would be derived from the current proposals to extend Parts 522 and 523 to foreign lawyers. Because the limited license under Part 522 is only valid for in-house practice, the amendments would have no effect on legal services provided to the general public. Nor is there risk of harm to the companies employing the foreign in-house lawyer. Companies large enough to have foreign in-house lawyers are sophisticated consumers of legal services. They have an on-going employment relationship with the foreign lawyer and are able to evaluate the foreign lawyer's competence and quality of work.

Moreover, under both rules, a foreign lawyer would be subject to the disciplinary jurisdiction of New York. If the foreign in-house lawyer acted unethically, New York would be able to take disciplinary action against the foreign lawyer.

IV. The New York Court of Appeals Should Consider a Broader Definition of Foreign Lawyers Eligible Under the Rules

While we commend New York for proposing these rules that recognize the international nature of corporate legal practice, we urge the Court of Appeals to consider adopting language that would allow a broader range of foreign lawyers to practice temporarily or register as in-house counsel in New York. Proposed Part 522.1(b)[4] applies to a foreign

[4] We focus on the language in Part 522.1(b) for this discussion, but we would make the same arguments with respect to Part 523, as that applies to lawyers "admitted and authorized to practice," (emphasis added).

lawyer who is:

> A member in good standing of a recognized legal profession in a foreign (non-U.S.) jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority.

The problem with this language is that it would exclude foreign in-house lawyers from jurisdictions where in-house lawyers are either not required or not permitted to hold law licenses. In these jurisdictions, in-house lawyers may not be admitted to practice and would not be regulated by a professional body or public authority. They would also be unable to satisfy the proof requirements found in Part 522.2, as they would not have the ability to obtain a certificate of good standing or letter from a grievance committee.

These requirements in the proposed rule would have a huge impact on the rule's applicability to foreign in-house lawyers. According to research conducted by the National Organization of Bar Counsel, more than 70% of the world's countries do not require in-house counsel to be members of the bar.[5] These are not jurisdictions with nascent corporate legal practices, but rather established and important global commerce partners such as France, Italy, China, Japan, India, and South Africa, to name just a few of the countries where in-house counsel are not even permitted to be members of the bar. The countries that do not require bar admission of in-house counsel still have stringent requirements for these lawyers. Generally, they are required to complete the same legal education requirements and often the same competency exams or apprentice requirements that lawyers in private practice must complete.

That is why the ACC endorses an approach to the admission of foreign in-house counsel that uses the language "authorized to practice." We would suggest the below change to the proposed language in Part 522.1(b):

> A member in good standing of a recognized legal profession in a foreign (non-U.S.) jurisdiction, the members of which are admitted or authorized to practice as lawyers or counselors at law or the equivalent ~~and subject to effective regulation by a duly constituted professional body or public authority~~.

This change would make the rule applicable to vastly more foreign in-house lawyers.[6] The ACC recently proposed similar language in Illinois, and Illinois

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[5] National Organization of Bar Counsel, "The Regulation of In-House Counsel – Overview of Research Trends," March 2015. Available at: http://nobc.org/docs/Global%20Resources/In%20House%20Counsel%20-%20Research%20OverviewMarch2015.pdf.

[6] To account for those jurisdictions that do not require a license to practice in-house we would also suggest changing the language in Part 522.1(b)(3) from "would similarly permit an attorney admitted to practice in this State to register as in-house counsel," to "would similarly permit an attorney admitted to practice in this State to *practice in the jurisdiction as in-house counsel.*"

recently adopted that language in its new Rule 5.5 and in-house registration rule. Illinois now allows lawyers "admitted or otherwise authorized to practice in a foreign jurisdiction," to register as in-house counsel in Illinois. Illinois Rule 5.5(e) states that "the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction." In the commentary to Rule 5.5(e) it is recognized that "structure and procedures vary among foreign jurisdictions," and that in considering the admission of a foreign lawyer from a jurisdiction where in-house counsel are not subject to regulation and discipline, "other attributes of the system must be considered to determine whether they supply assurances of an appropriate legal background."

We think the approach adopted by Illinois strikes an ideal balance between the need for companies to be able to employ foreign lawyers from legal systems with different structures and the need for the state to have some assurance of the competence of foreign lawyers admitted under the rule. As New York's proposed approach would exclude foreign lawyers from 70% of the world's jurisdictions, we strongly urge New York to adopt a broader approach and use the "authorized to practice" language.

* * *

Companies need a wide choice of foreign counsel to accommodate their expanding global needs. We urge New York to consider our modification to the proposed amendment to Part 522. If New York does not adopt our suggested modification, we still strongly support the proposed amendments to Parts 522 and 523. Making it easier for companies to employ in-house lawyers from foreign countries will greatly boost New York's ability to compete on the global stage. We strongly urge the New York Court of Appeals to adopt the amendments to these rules.

Sincerely yours,

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Director of Government and
Regulatory Affairs
Association of Corporate Counsel

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ACC Greater New York
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DHI Group, Inc. (f/k/a Dice Holdings, Inc.)

Dobbyn Colm
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Shannon Green
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Blue State Digital, LLC

Jennifer M. Daniels
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Colgate-Palmolive Company

John Huleatt
General Counsel
Community Products LLC

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General Counsel
R&P Pools, Inc. d/b/a Leisure Living

Leslie Park
General Counsel
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General Counsel & Senior Vice President
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Maxine Verne
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Deirdre Stanley
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Thomas Reuters Corporation

Kashif Sheikh
Managing Principal & General Counsel
Westbrook Partners

Claudia Toussaint
SVP, General Counsel and Corporate Secretary
Xylem Inc.

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November 9, 2015

VIA EMAIL
Hon. Lawrence K. Marks
Chief Administrative Judge
NYS Unified Court System
25 Beaver Street
New York, NY 10004
lmarks@nycourts.gov

Re: Proposed amendments to a new Part 523, §523.2(a) of the Rules of the Court of Appeals regarding temporary practice; and Part 522, §522.1 (22 NYCRR Part 522 & Part 523)

Dear Judge Marks:

Your Advisory Committee on Civil Practice has reviewed the proposed amendments to the Rules of the Court of Appeals regarding temporary practice and appearance by an attorney not admitted to practice in New York. The Committee offers the following comment.

First, the Committee supports the proposed amendment to § 522.1.

Second, the Committee is opposed to the adoption of the proposed § 523 in its present form because it believes that the language is far too broad and uncertain. The proposed new section addresses four situations in which a lawyer admitted in a jurisdiction other than New York may be permitted to temporarily practice law in New York, as set forth in Exhibit "A" (9/21/15)(attached). The Committee found paragraphs (a) and (c) to be acceptable, but it felt (b) and (d) could be interpreted in ways that would make temporary practice potentially too broad. The Committee understood that the apparent purpose of sub-paragraph (b) is to allow counsel to associate with other counsel admitted to the state or admitted pro hac vice, but the language could be interpreted much more broadly. Moreover, the Committee felt that the current pro hac vice procedures work reasonably well and did not see the need for further expansion. Similarly, paragraph (d) allows out of state attorneys to practice in this state based upon a belief that their proposed New York practice is "reasonably related" to their practice in their own jurisdiction. That phrase, the Committee felt, is far too broad and ambiguous.

Third, the members recommend further study of elements of a registration proposal, including consideration of whether it would use the in-house counsel model, whether it would require a fee, whether it should be temporary, e.g., for a particular matter or particular periods of time, and whether it would be renewable. The Committee would be pleased to review a registration proposal if one is drafted.

We remain available to answer any further questions you may have and thank you for giving us the opportunity to comment on this proposal.

Sincerely,

George F. Carpinello

cc: John W. McConnell, Esq.
Holly Nelson Lütz, Esq.